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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-339

EMPLOYEE-OFFICER JOHN, #1765 Badge Number, Manhattan House of Detention for Men, 125 White Street, New York, N. Y.,

Petitioner,

—against—

AUSTRALIA JOHNSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on June 29, 1973, insofar as it reversed (2 to 1) an order of the District Court for the Southern District of New York dismissing respondent's action against petitioner under 42 U.S.C. § 1983.

Opinions Below

The opinion of the Court of Appeals, not yet reported, appears as Appendix B. The opinion of the District Court is reported at 352 F. Supp. 557 and appears as Appendix C. The judgment of the Court of Appeals appears as Appendix A.

Jurisdiction

The judgment of the Court of Appeals was entered on June 29, 1973. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Question Presented

Does a complaint which alleges the striking of a prisoner by a New York City prison guard on a single occasion present a question of deprivation of constitutional rights so as to state a cause of action under 42 U.S.C. § 1983?

Statutory Provision Involved

United States Code, Title 42, § 1983, provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Statement of the Case

The incident complained of allegedly occurred on May 12, 1972, as respondent was being returned to the Manhattan House of Detention from the court where he was being tried for murder.* The complaint alleges that an officer told the respondent and other inmates to go into the back room so that they could be searched, but that another officer in the backroom then told them to go back inside the cell.

On their returning to the cell, petitioner, Officer John, started yelling at them. Respondent informed Officer John that they were doing what they had been told. Officer John then ran into the cell, grabbed respondent by the collar and hit him twice on the side of the head with something enclosed in his fist. During the incident, Officer John stated, "I'll kill you old man, I'll break you in half." He then harassed respondent by detaining him in a cell for about two hours before returning him to his floor.

After being returned to his floor, respondent asked to see a doctor. Instead of sending him into the doctor's office immediately, Officer John kept him in a cell for about another two hours. The doctor then gave respondent medication in the form of "pain pills."

Respondent alleges that, as a result of the blows, he has had terrible pains in the head and has suffered mental anguish. He named as defendants not only Officer John but also Mr. Glick, the Warden at that time of the Manhattan House of Detention.

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* In its opinion, the District Court noted that respondent has since been convicted of manslaughter and was serving a term in state prison.

In his opinion, Judge KNAPP of the District Court stated that the case seemed to present the question whether every assault upon a prisoner giving rise to a tort action under state law becomes actionable under Section 1983 simply because the person assaulted was in custody and the tortfeasor was a prison guard (17a).* He concluded that no cause of action had been stated against Officer John. He found it unnecessary, therefore, to reach the question of whether the warden would be answerable for the act of his subordinate.

The Court of Appeals affirmed the dismissal of the complaint against the warden, but reversed (2 to 1) as to Officer John. In the majority opinion, Judge FRIENDLY stated that it was doubtful that the cruel and unusal punishment clause of the Eighth Amendment was applicable since respondent had not yet been convicted and sentenced when the incident took place (7a-8a). He held, however, that both before and after sentence the constitutional protection against police brutality is not limited to conduct violating the specific command of the Eighth Amendment (10a). "[Q]uite apart from any 'specific' of the Bill of Rights, application of undue force by law enforcement officers deprives a suspect of liberty without due process of law" (10a). Although conceding that not every unnecessary push or shove violates a prisoner's constitutional rights, he concluded that enough had been alleged in the complaint to sustain a cause of action (12a). He recognized that the upholding of the complaint might well lead to considerable further expansion of actions by state prisoners under Section 1983 (5a).

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* Numerals in parentheses refer to the pages of the Appendices attached to this Petition.

In his dissent, Judge MOORE stated that the facts did not give rise to a deprivation of constitutional rights protected by either the Eighth Amendment or by the due process clause of the Fourteenth Amendment (14a). The case did not present a continuous or systematic pattern of police brutality, but only a single, isolated incident in which a prison guard, perhaps unnecessarily aggressive in discharging his duties, administered a few blows to a prisoner (14a). Judge MOORE was of the opinion that the majority opened up a Pandora's box by inviting civil rights' actions from all prisoners who felt that their prison guards had treated them unnecessarily harshly (15a). This would lead inevitably to further overburdening of the federal district court dockets and to drawing the federal courts unnecessarily into supervising the day-to-day affairs of state prisons (15a).

REASONS FOR GRANTING THE WRIT

The decision below over-expands the concept of what is actionable under Section 1983. In view of the conflict between the Circuits on the question involved and in view of the great impact of the decision on the bringing of civil rights' actions by state prisoners, the case merits review by this Court.

What is here involved is a single, isolated incident in which a guard struck a prisoner. As the District Court noted, there is no suggestion that the guard intended to hinder or prevent respondent from asserting his rights in any court or that he was acting in reprisal for past assertions of such rights (17a). It would appear to be unduly stretching matters to elevate the incident to a deprivation of constitutional rights, actionable under Section 1983.

There are decisions under which the allegations herein would be sufficient to constitute a cause of action under Section 1983. This is most clearly apparent in decisions in the Ninth Circuit. See *Allison* v. *Wilson,* 434 F. 2d 646 (9th Cir., 1970), cert. den. 404 U. S. 863, and cases cited therein. There are other decisions, on the other hand, where the present facts would not be sufficient to state a cause of action under Section 1983. This is especially clear in Eighth Circuit decisions. *Davis* v. *United States,* 439 F. 2d 1118 (8th Cir., 1971); *Cole* v. *Smith,* 344 F. 2d 721 (8th Cir., 1965). See, also, *Bethea* v. *Crouse,* 417 F. 2d 504, 507-509 (10th Cir., 1969); and *Fisher* v. *Turner,* 335 F. Supp. 577 (D. Utah, 1972).

It is submitted that the better line of authority is the one that would bar a cause of action under the present facts. As Mr. Justice DOUGLAS stated in *Screws* v. *United States,* 325 U. S. 91, 108 (1945), the fact that a prisoner is assaulted or injured by state officials does not necessarily mean that he is deprived of any right protected by the United States Constitution.

As even the majority opinion below recognized, the decision herein will undoubtedly lead to a great expansion of civil rights' actions by state prisoners. In view of the conflict between the Circuits and the impact of the decision below on the bringing of civil rights' actions, it is respectfully submitted that the case merits review by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

August 22, 1973.

Respectfully submitted,

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